

**Common Order below Exhibit-47 & 59 in
Commercial Suit No. 1 of 2022**

Appearance :

On behalf of the plaintiff : Ld. Adv. Shree H. R. Dhoriyani.

On behalf of the defendant No. 2/1 & 2/2 : Ld. Adv. Mr. S. R. Upadhyay.

On behalf of the proposed parties : Ld. Adv. Mr. V. C. Jani.

[1.1] The plaintiff has filed an application at Exh.-47 under Order-I, Rule-10 of the Code of Civil Procedure, 1908; and prayed that the proposed parties namely, (1) Jay (Lalo) Prajapati, (2) Rahul Jalabhai Dangar and (3) Jalabhai Hamirbhai Dangar may be joined as parties; and such further and other orders may be passed as the Court may deem fit and proper.

[1.2] The plaintiff has filed an application at Exh.-59 for correction of name of proposed party No. 1, i.e. Laljibhai Naginbhai Prajapati instead of Jay (Lalo).

[1.3] The Ld. Adv. for the defendant Nos. 2/1 & 2/2 and the proposed parties have filed their written reply respectively at Exhs.- 55, 56, 60 & 61 and denied the facts of the present application in toto, inter alia, contended that one can do anything as per and according to the Constitution of India; that misusing the legal procedure, the plaintiff has filed wrong application; that order for costs may be passed under Sec. 35(3) (a) of the Commercial Courts Act; what the plaintiff wants joining the proposed parties is a question; that as per the provisions of Sec.-12 (A) of Chapter-III of the Commercial Courts Act, the pre-institution mediation is mandatory; that the ratio laid down in the case of M/s. Patil Automation Pvt. Ltd. V/s. Rakheja Engineers Pvt. Ltd. being Civil Appeal No. 5333 of 2022, arising out of Special Leave Petition (Civil) No. 14697/2021 should be considered. Ultimately, prayed to reject this application.

[2] Heard the Ld. Adv. for the parties. Perused the record and proceedings. Read the applications and its written

replies. Considered the relevant provisions of law. Considered the arguments of the parties to the suit and proposed parties.

[3.1] The Ld. Adv. for the plaintiff has orally argued encircling the provisions of Order-I, Rule-10 of CPC that there is question of dealership before the Court; that the proposed parties are being worked to sell items of Umiya Tea and have started shop / outlet; that they must be joined; name Jay (Lalo) is written on visiting card of the proposed party No. 1; that notice was given to Jay (Lalo) and he replied with alias name; that in Vakalatnama, the same name has been declared by the party himself. Ultimately, prayed to allow this application.

[3.2] The Ld. Adv. for the proposed parties have argued orally, and the same have been adopted by the Ld. Adv. for the defendant Nos. 2/1 & 2/2, that since the application under Order-VII, Rule-11 is pending, the application on hand cannot be filed; that there is no documentary evidence to establish that the proposed parties are dealer / have dealership; that the provisions of Sec. 12 must be followed, but in the case on hand, the same have not followed at all; that the matter is being lingered due to plaintiff himself; that there is no reason why the proposed parties should be joined; that the complaint has been filed, but is not proved; that their reply should be considered. Ultimately, prayed to reject this application.

[4] Considering the pleadings, there is dispute between the Umiya Tea Pvt. Ltd. and the plaintiff; that as per the order passed below Exhs.-16 and 17, respectively the defendant Nos. 3 & 1 have been struck out.

[5] The plaintiff has come with the facts that the dealership of the plaintiff is in existence, even though the proposed parties have jointly started to sell all the items of Umiya Tea in Halvad and villages of Halvad Taluka starting a shop in the name and style of Maruti Enterprise.

[6] In light of the provisions of Sec. 12 (1) of the Commercial Courts Act, a suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Govt. Considering the facts of the application and documentary evidence produced at Exh.-48 along with the application on hand, the plaintiff has not exhausted the remedy of pre-institution mediation with the proposed parties. The proposed parties have been prayed to be joined as parties, amounts institution of fresh suit against them. Considering the nature of suit, pleadings and the provisions of Sec.-12(1) of the Act, the proposed parties being separate and new party, they must be a party in pre-institution and the plaintiff must exhaust the remedy of pre-institution.

[7.1] In the case of **M/s. Patil Automation Pvt. Ltd.**¹, the Hon'ble Apex Court has laid down the following ratio in para-84.

“We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order-VII, Rule-11. This power can be exercised sue moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20/08/2022 so that concerned stake holders become sufficiently informed. Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff. Finally, if the plaint is filed violating Section 12A after the Jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief.”

[7.2] As discussed above, the plaintiff has not exhausted

1 M/s. Patil Automation Pvt. Ltd. V/s. Rakheja Engineers Pvt. Ltd. reported in 2022 AIJEL SC 0-69698

the remedy of pre-institution mediation with regard to the proposed parties. Secondly, the plaintiff has not shown any fact or circumstance which contemplates any urgent interim relief under this Act; therefore, the plaintiff has violated the provisions of Sec.-12-A of the Act. Therefore, there is no further discussion is required for the reasoning whether the proposed parties are proper party or necessary party.

[7.3] The plaintiff has filed an application at Exh.-59 for correction of name of proposed party No. 1, i.e. Laljibhai Naginbhai Prajapati instead of Jay (Lalo); but, when the original application at Exh.-47 under Order-I, Rule-10 of CPC fails, the application for correction in the said application at Exh.-59 becomes infructuous.

[7.4] In view of the afore noted discussion, the following order is passed in the interest of justice.

-:: ORDER ::-

- (a) The application at Exh.- 47 and 59 are hereby rejected.
- (b) A note about this order to be put below Exh.-59.
- (c) The cost shall follow the final disposal of the present suit.

Pronounced in the open Court today, on this 5th day of October, 2023.

Halvad.

Date : 05/10/2023.

(Anil Nanalal Gajjar)

Principal Senior Civil Judge,
Halvad, Dist. Morbi. (GJ-01166)